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No. 82-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE B. DALY, GEORGE B. KAISER and DON H. NELSON, Individually and on Behalf of All Other Persons Similarly Situated, Collectively and as a Class,
Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, Individually and on Behalf of All Other Persons Similarly Situated, Collectively and as a Class,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

Whether the Temporary Emergency Court of Appeals had jurisdiction to decide—and correctly decided—the issues of (a) whether the interest owners of a former "stripper well lease" who contributed the lease to a unit lost all right to classify and sell at "stripper" prices any barrels of unit production allocated to the unit tract corresponding to such "lease," except that portion of the total unit volume of "imputed stripper well crude oil" allocated by the unit agreement to such unit tract, once a unit base production control level (BPCL) was established pursuant to 10 C.F.R. § 212.75; and (b) whether the method of allocating unit production to tracts on the basis of participation percentages set forth in a formal unitization agreement entered into prior to the promulgation of 10 C.F.R. § 212.75, but effective thereafter, governed allocation of all unit production, including "old oil," "new oil" and "imputed stripper well crude oil," at such time as the unit agreement became effective and a unit BPCL was established pursuant to 10 C.F.R. § 212.75.*

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* Pursuant to Rule 28.1 of the Rules of this Court, respondents provide the following list of their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates. *Exxon Corporation:* Exxon Pipeline Company, Imperial Oil, Limited, and Reliance Electric Company. *Marathon Oil Company:* United States Steel Corporation, Arctic LNG Transportation Company, Kenai Corporation, and Polar LNG Shipping Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	5
I. The Petition Should Be Denied Because TECA Had Jurisdiction And Its Decision Does Not Conflict With Other Courts	5
II. TECA Correctly Construed The Imputed Stripper Regulations	11
CONCLUSION	14

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: Page

Citronelle-Mobile Gathering, Inc. v. *Gulf Oil Corp.*, 591 F.2d 711 (TECA), *cert. denied*, 444 U.S. 879 (1979) 3, 6

Coastal States Marketing, Inc. v. *New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979) 10, 11

Francis Oil & Gas, Inc. v. *Exxon Corp.*, 661 F.2d 873 (10th Cir. 1981) 13

Grigsby v. *DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979) 12

Gulf Oil Corp. v. *DOE*, 639 F.2d 766 (TECA 1981) ... 9

MGPC, Inc. v. *DOE*, 673 F.2d 1277 (TECA 1982) 9

Mountain Fuel Supply Co. v. *Johnson*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979) . 3, 6

Pennzoil Co. v. *United States*, 680 F.2d 156 (TECA), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (June 18, 1982) 12

Texaco v. *DOE*, 616 F.2d 1193 (TECA 1979) 6, 9

United States v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1254 (1982) 6, 10

STATUTES:

Emergency Petroleum Allocation Act of 1973, *as amended*, 15 U.S.C. § 751 3

CODE OF FEDERAL REGULATIONS:

10 C.F.R. § 212.75, 41 Fed. Reg. 4931 (Feb. 3, 1976) . 5, 7

10 C.F.R. § 212.54, 41 Fed. Reg. 48319 (Nov. 3, 1976) 8

MISCELLANEOUS AUTHORITIES:

Williams & Meyers, *Oil & Gas Law: Manual of Oil and Gas Terms* (1978) 2

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STATEMENT OF THE CASE

This controversy concerns the proper method for allocating total monthly production from the Yates Field Unit,[1] classified into various pricing tiers under Federal Energy Administration (FEA) regulations, among parti-

[1] A crude oil producing unit, such as the Yates Field Unit, located in Pecos and Crockett Counties, Texas, is defined as an area of land, or deposit or pool of crude oil, as to which parties with interests therein are bound to share in the crude production on a specified

cipants in the Unit. This controversy arose because the FEA created a new regulatory classification of crude oil, "imputed stripper well crude oil," after the time the Yates Field Unit Agreement and Unit Operating Agreement were entered into in 1975.

The named petitioners in this case are working interest owners[2] in Tract 117 of the Yates Field Unit.[3] Respondent Exxon Corporation (Exxon) is also a working interest owner in the Unit and purchased all production allocated to Tract 117 from July 1, 1976, when the Unit became operational, until October 1, 1980.[4] Respondent Marathon Oil Company (Marathon) owns almost half the working interest in the Unit and was named Unit Operator under the terms of the Yates Field Unit Operating Agreement.[5]

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basis, and as to which those persons having the right to conduct production operations are bound to share investment and operating costs on a specified basis. Williams & Meyers, *Oil and Gas Law: Manual of Oil and Gas Terms* 624 (1978) (hereinafter cited as "Williams & Meyers").

[2] Interests in oil and gas include both "working interest" and "royalty interest" owners. A "working interest" is defined as the operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land. By definition, a "royalty interest owner" is owner of a share of the crude oil production from a lease, free of expenses of production. Williams & Meyers, at 511-12 & 655.

[3] The Yates Field Unit consists of 122 "tracts," each comprised of one or more oil and gas leases. Yates Field Unit Agreement, Original Exhibit A, R. 109.

[4] Petition For A Writ Of Certiorari (hereinafter "Petition") at A-23 and A-24.

[5] *Id.* at A-23.

Petitioners initiated the present action on May 27, 1980 by filing a Class Action Petition for Declaratory Judgment in the 83rd Judicial District Court of Pecos County, Texas. Petitioners sought a declaratory judgment construing the effect of the Yates Field Unit Agreement and Yates Field Unit Operating Agreement on so-called "rights to and benefits of stripper well pricing."[6] Respondents removed this case to the federal District Court for the Western District of Texas, Pecos Division, in part because resolution of petitioners' claims would require the adjudication of issues arising out of the Emergency Petroleum Allocation Act (EPAA) of 1973, *as amended*, 15 U.S.C. § 751 *et seq.*[7]

The district court determined that removal was appropriate and that this case should proceed as a bilateral class action.[8] After extensive discovery and briefing, the district court heard oral argument on cross motions for summary judgment. The district court thereafter ruled for the petitioner class and denied respondents' motion for summary judgment on January 15, 1982, later enter-

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[6] Class Action Petition for Declaratory Judgment ¶¶ V, VI, XI, XII, R. 3-4 and R. 6-7.

[7] Petition for Removal ¶ 5, R. 9-10. A complaint alleging a cause of action sounding solely in contract may nevertheless invoke a substantial federal question involving the construction, application and effect of the EPAA and federal petroleum price regulations. *E.g.*, *Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375, 1380 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979). *See also Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 715-16 (TECA), *cert. denied*, 444 U.S. 879 (1979).

[8] R. 415.

ing an "Amended Summary Judgment" by order dated February 3, 1982.[9]

Contrary to the petitioners' assertion that the district court "squarely based its decision on state contract law,"[10] the district court held that FEA regulations at all times contained an exemption for price controls for production from "stripper well leases" and that nothing in the regulations qualified such exemption.[11] On this basis the district court determined that FEA regulations provided for all leases which were "stripper well leases" prior to their inclusion in the Yates Field Unit to be allocated 100% of the total Unit volume of "imputed stripper well oil"—unless petitioners had agreed by express contractual provision to share Unit production in that category with other unit participants.[12] This erroneous approach to the FEA regulatory scheme led the district court to rule for the plaintiff class, finding that the Yates Field Unit Agreement did not contain the express contractual provision the district court believed to be necessary.[13]

Through its interpretation and "examin[ation] [of] the federal pricing regulations,"[14] the district court erroneously concluded that former stripper well leases included in the Yates Field Unit continued to be separate "properties" after the establishment of a unit BPCL and

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[9] R. 2622. The Amended Summary Judgment is Appendix C to the Petition.

[10] Petition at 4.

[11] Petition, Appendix C, at A-17.

[12] *Id.* at A-19 and A-20.

[13] *Id.* at A-20 and A-21.

[14] *Id.* at A-20.

thereby committed an error that permeated the court's opinion. Thus, the district court incorrectly determined that ownership of "imputed stripper well crude oil" was provided by FEA regulations directly to former stripper well leases in a unit.

On appeal the Temporary Emergency Court of Appeals (TECA) determined that this case raised federal energy issues and concluded that it had jurisdiction to review the district court's decision. TECA examined the preamble to section 212.75[15] and concluded that the "language [of the preamble] makes clear that the previously-qualified stripper well leases retain significance only for purposes of calculating the quantity of imputed stripper oil these leases contributed to the unit."[16] Thus, TECA concluded that the district court's determination was contrary to the FEA's own interpretation of § 212.75. Consequently, TECA appropriately reversed and corrected the district court's error.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE TECA HAD JURISDICTION AND ITS DECISION DOES NOT CONFLICT WITH OTHER COURTS

The petitioners' principal argument in petitioning this Court is that TECA's carefully considered conclusion that it had jurisdiction over this case conflicts with other decisions of that court and decisions of other courts. Petitioners raised the identical jurisdictional argument before TECA and that court considered and rejected the peti-

[15] The text of 10 C.F.R. § 212.75, the "imputed stripper well crude oil" regulation, is reproduced in the Petition at 2-3.

[16] Petition at A-12.

tioners' assertions.[17] Contrary to petitioners' contention, in this case TECA simply applied the identical jurisdictional standard as applied by other panels of that court and by other courts—whether resolution of the litigation in its entirety requires the application or interpretation of the EPAA and implementing regulations, and whether an EPAA issue has been adjudicated.[18] Applying the traditional jurisdictional standard, TECA correctly concluded that it had jurisdiction over this controversy.

The petitioners now argue that no federal regulatory issue was adjudicated by the district court and therefore TECA never had jurisdiction. Review of the district court's decision and petitioners' representations to the district court confirm that federal energy issues underlie and pervade this litigation. Throughout the district court proceedings petitioners seemed to appreciate fully that their claims required interpretation of FEA's domestic crude oil price regulations. According to petitioners' first brief in the district court:

> [T]he Yates Field Unit, . . . although governed by private contract, is subject to a *supervening federal*

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[17] *See id.* at A-6 and A-7.

[18] *Id. See Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 716 (TECA), *cert. denied*, 444 U.S. 879 (1979); *Texaco, Inc.* v. *DOE*, 616 F.2d 1193, 1198 (TECA 1979); *Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946, 949 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1254 (1982).

> *standard* of a set amount of stripper well pricing benefits to be dispersed through the entire unit. . . .[19]

Petitioners later contended, in support of their motion for summary judgment, that their claim to "stripper well pricing benefits is totally dependent on individual tracts qualifying for stripper well pricing *prior* to unitization."[20]

Having bottomed their claims squarely on the "stripper well status" of their leases prior to unitization, the petitioners persuaded the district court to accept their vested rights approach to the FEA regulatory scheme. Now petitioners vigorously protest that TECA, in reversing the district court, improperly turned its specialized, appellate court review on the issues of regulatory interpretation spawned by their own legal theories and assertions.

The district court misconstrued the FEA's policy announcement that made the allocation of imputed stripper well crude oil barrels within a unit a matter solely for the private agreement of unit participants.[21] The district court's decision turned this neutral FEA policy on its head by holding that FEA regulations vested imputed stripper well crude oil in certain, favored unit participants, *i.e.*, those with stripper well leases prior to unitization, subject only to the right of such persons to contract to share their "stripper pricing benefits" with other unit

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[19] Brief in Support of the Named Plaintiffs' Motion for Class Action Certification, at 20-21 (emphasis added), R. 61-62.

[20] Reply Brief in Support of Named Plaintiffs' Motion for Summary Judgment and Answer Brief in Opposition to Named Defendants' Counter Motion for Summary Judgment, at 12 (emphasis in original), R. 2433.

[21] *See* 41 Fed. Reg. 4931, 4937 (Feb. 3, 1976).

participants. The district court's erroneous holding rested on no less than four aberrant "interpretations" of FEA regulations, set forth below, which respondents challenged before TECA and which served as a basis for TECA's acceptance of jurisdiction over this case:

> [T]he federal pricing regulations do not and were not intended to apply to any stripper oil which qualifies under 10 C.F.R. § 212.54(c), regardless of whether it had been unitized.[22]
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> * * *
>
> The FEA specifically exempted stripper oil from federal pricing regulations. 10 C.F.R. § 212.54. Nothing in the regulations conditions or otherwise qualifies this exemption.[23]
>
> * * *
>
> . . . [T]he stripper exemption applies to stripper tracts which have been unitized as well as to those which have not been.[24]
>
> * * *
>
> . . . [T]he regulation establishing a base production control level does not affect stripper status.[25]

In light of the challenged regulatory interpretations of the district court, TECA correctly concluded that an EPAA question was adjudicated by the district court—the touchstone for determining TECA's jurisdiction to

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[22] Petition, Appendix C, at A-20.

[23] *Id.*

[24] *Id.* at A-21.

[25] *Id.* at A-22, n.5.

hear an appeal.[26] Furthermore, no matter now much lip service petitioners pay to the "state law" basis of their claims, their jurisdictional argument must fail since TECA correctly looked to the nature of the issue presented on appeal to determine whether it had subject matter jurisdiction.[27]

Significantly, the petitioners' own characterization of the so-called "state law" issue decided by the district court conclusively demonstrates that EPAA issues are inseparable from any other conceivable branch of this case. According to petitioners:

> The District Court also held that, as a matter of state contract law, the stripper well pricing benefits [afforded by the federal pricing regulations] after unitization belong to the individual tracts, giving rise to the benefits and are not allocated to other tracts. . . .[28]

TECA recognized that petitioners had raised and the district court had adjudicated an EPAA issue, and that petitioners' lawsuit squarely involved federal pricing regulations. TECA concluded that:

> Appellees claim they are entitled to favorable treatment under a specific federal regulatory provision, the stripper well exemption. Their entitlement to this price or any other, during the period in question,

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[26] *See Texaco, Inc.* v. *DOE*, 616 F.2d 1193, 1198 (TECA 1979); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979). *See also* note 17 *supra*.

[27] *See, e.g., MGPC, Inc.* v. *DOE*, 673 F.2d 1277, 1281 (TECA 1982); *Gulf Oil Corp.* v. *DOE*, 639 F.2d 766, 767 (TECA 1981).

[28] Petition at 4.

was *entirely governed by the federal price control regulations.*[29]

The Court of Appeals further concluded that the district court's decision "rests significantly on the court's analysis of federal regulations . . . [and that] an EPAA issue was thereby adjudicated. . . ."[30]

Contrary to petitioners' assertion, *United States* v. *Uni Oil, Inc.*[31] does not conflict with TECA's decision in this case. Indeed, in that case the Fifth Circuit observed that "if the district court adjudicated an EPAA issue, we lack jurisdiction."[32] Moreover, in that case there was no hint that the trial court had interpreted any EPAA regulations whatsoever. Similarly, in *Coastal States Marketing, Inc.* v. *New England Power Petroleum Corp.*,[33] jurisdiction was found lacking and the court concluded that the "appeal therefore rests with the TECA."[34] The Second Circuit concluded that jurisdiction rested exclusively with TECA whenever there existed "adjudications by a district court of an '[Economic Stabilization Act] issue.' "[35]

In this case the district court clearly interpreted the Emergency Petroleum Allocation Act and its implementing regulations. Thus, petitioners' apparent suggestion that the Fifth Circuit should have reviewed the district

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[29] *Id.* at A-7 (emphasis added).

[30] *Id.* at A-7 and A-8.

[31] 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1254 (1982).

[32] *Id.* at 949.

[33] 604 F.2d 179 (2d Cir. 1979).

[34] *Id.* at 187.

[35] *Id.*

court's decision[36] is curious since that court could not provide meaningful review. That court would be forced to review the application of the Yates Field Unit Agreement and Unit Operating Agreement to the allocation of oil classified as "imputed stripper well crude oil" without being empowered to determine whether that crude oil pricing category described actual barrels of crude oil produced from the unit, or merely created an abstract "right" to sell crude oil at a premium price.

Finally, Part B of petitioners' Petition, entitled "Important question of federal law," confirms the conclusion that this case involves federal regulatory issues that any court other than TECA simply would not be empowered to answer. The petitioners—having conceded that an "important question of federal law" exists—should not be permitted by this Court to protest that TECA lacked jurisdiction because petitioners couched their complaint in state law terms. This blatant inconsistency in petitioners' position further confirms the propriety of the well-considered decision by TECA concluding that it had jurisdiction.

II. TECA CORRECTLY CONSTRUED THE IMPUTED STRIPPER REGULATIONS

The petitioners next complain that TECA improperly construed the imputed stripper well regulations and disregarded the Department of Energy's (DOE) own interpretation of its regulations. More specifically, petitioners attack what they refer to as TECA's "concept of neutrality" in the regulations.[37]

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[36] *See* Petition at 5.

[37] *Id.* at 16-18.

The petitioners raised the identical argument before TECA which prompted that court to comment that petitioners "misapprehend the sense in which the regulations are 'neutral.' "[38] Examining the relevant regulation and the agency comments in the accompanying preamble, TECA concluded that

> [t]he plain language of § 212.75 would seem to make clear that a property qualified as a "stripper well lease" prior to unitization would cease to qualify as a separate property, with a separate exemption, upon unitization; however, the unit would still be able to recognize and benefit from the historical stripper well status of some of its constituent parts through the imputed stripper well exemption.[39]

TECA further concluded that in light of the agency's regulations and several prior TECA decisions,[40] "there can be no serious question that the Yates Field was a single property for regulatory purposes and that the quantities of oil falling into the 'old,' 'new,' and 'stripper' categories had to be calculated on the basis of the unit as a whole."[41]

As to the petitioners' misapprehension of the neutrality of the regulations, TECA concluded that the question ultimately separating the parties in this case was "how should the unit's imputed stripper well exemption be

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[38] *Id.* at A-8.

[39] *Id.* at A-10.

[40] *Pennzoil Co.* v. *United States*, 680 F.2d 156 (TECA), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (June 18, 1982); *Grigsby* v. *DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979).

[41] Petition at A-12.

allocated among the participants."[42] The court concluded that "it is in this respect that the federal regulations were intended to be neutral."[43] In this case the FEA regulations left to private agreements the manner in which the imputed stripper well prices would be allocated among the different participants in the Unit. And, as participants in the unitization of the Yates Field, the petitioners agreed to the participation formula set forth in the Unit Agreement and their share of the imputed stripper crude oil is calculated appropriately under that provision of the private agreement. As recognized by TECA, the district court's ruling that only the pre-unitization stripper well property owners retained the imputed exemption was itself an allocation to particular participants thereby nullifying the FEA's explicit requirement that allocation should be left as a matter of private resolution among participants of the Unit Agreement.[44]

Finally, petitioners attempt to establish a vested right to "stripper well pricing benefits" by implying that the DOE sanctioned petitioners' view of the regulations in responding to a Request for Interpretation filed by Exxon in 1977.[45] As the record reflects in this case, that

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[42] *Id.* at A-13.

[43] *Id.*

[44] The petitioners attempt to portray Marathon's efforts to unitize the Yates Field as a *fait accompli* to the named petitioners. Petition at 6. However, in a related action, *Francis Oil & Gas, Inc.* v. *Exxon Corp.*, 661 F.2d 873 (10th Cir. 1981), the Court contradicted such a portrayal and concluded that "[d]espite the prejudice to Francis in having production from the unit allocated according to tract size, Francis nevertheless signed the Unit Agreement under strong and explicit protest *but with full awareness of the consequences of the terms.*" *Id.* at 875 (emphasis added).

[45] Petition at 8-9, 11, 17, and Appendix D.

assertion is disingenuous at best and merely repeats an argument previously rejected by TECA. Exxon's Request for Interpretation dealt *only* with the question of who, as between petitioners and the Unit Operator, Marathon, was required to supply Exxon with the certifications required by the mandatory crude oil pricing regulations. Exxon's Request for Interpretation went no further than that, and the DOE's response to Exxon's Request for Interpretation deals only with that specific and limited question.[46] TECA therefore properly concluded that "no certification-related question has been litigated or properly raised on appeal in this case."[47]

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[46] The DOE's response to Exxon's Request for Interpretation is Appendix D to the Petition.

[47] Petition at A-5, n. 2.

CERTIFICATE OF SERVICE

I, David J. Beck, hereby certify that on the 18th day of October, 1982, three true and correct copies of this Brief in Opposition were placed in the United States mail, correct postage prepaid, addressed to Frederic Dorwart and J. Michael Medina, Suite 700, 10 E. 3rd St., Tulsa, Oklahoma 74103.

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